No. 77-1401

In the Supreme Court of the United States

OCTOBER TERM, 1977

GUY GOODWIN, PETITIONER

v.

JOHN BRIGGS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1401

GUY GOODWIN, PETITIONER

v.

JOHN BRIGGS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

---

1. The principal reason given by respondents for opposing the petition is that, although the issue presented by this case—the scope of absolute prosecutorial immunity from civil suit—is important, it should not be reviewed by this Court until further facts are developed in the trial of petitioner on the merits (Br. in Opp. 6). In other words, respondents contend that petitioner must be subjected to a trial on the merits before it can be determined whether

he is immune from a trial on the merits. However, as this Court emphasized in *Imbler* v. *Pachtman*, 424 U.S. 409, 424-425, one of the principal reasons for absolute (as opposed to qualified) immunity is to protect a prosecutor from the burdens of having to defend his actions in a civil trial, often (as here) years after the fact. As the Court stated (*id.* at 425-426):

> [I]f the prosecutor could be made to answer in court each time [a person whom he had prosecuted] charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law.
>
> * * * Defending * * * decisions [that could engender colorable claims of constitutional deprivations], often years after they were made, would impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials.[1]

Beyond that, respondents err in contending that the immunity question depends on the development of additional facts. The complaint alleged that in response to a question put to him by the district court in the course of grand jury proceedings that petitioner was conducting, petitioner falsely testified under oath that none of the witnesses subpoenaed by the grand jury who were represented by counsel was a government informant. For the purposes of petitioner's motion to dismiss on immunity grounds, that allegation must be taken as true,[2] and there is consequently no need for a trial "to determine the true nature of petitioner Goodwin's act * * *" (Br. in Opp. 14).[3]

---

[1] Respondents' argument that the determination of petitioner's immunity requires a trial on the merits also is answered by the Court's statement (424 U.S. at 419 n. 13):

> The procedural difference between the absolute and the qualified immunities is important. An absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity. The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial.

[2] Petitioner could, however, attempt to show at trial, if the Court should hold that he is not immune, that he did not know that Poe was an informant, that he did not know that Poe was represented by the attorneys who claimed to do so, or that the question was ambiguous. Contrary to respondents' claims (Br. in Opp. 4, 10; footnote omitted), petitioner has not "virtually conceded that [he] falsely testified as he did in order to conceal an informer in the defense camp * * *." The discussion in the petition properly assumed the truth of the allegations for purposes of analyzing the questions of law raised by the motion to dismiss but did not concede any factual defenses that might be available if petitioner were to go to trial (see Pet. 12 n. 6). The petition simply stated (*ibid.*) that examination of the complaint itself and the exhibits to it reveal circumstances that, as an objective matter, called for the exercise of quick judgment and discretion—the same kinds of actions that this Court in *Imbler* held required an absolute immunity warranting dismissal of the complaint without a determination at trial of the prosecutor's actual motives and understanding.

[3] The Court granted review in two other immunity cases that were in a similar procedural posture. See *Butz* v. *Economou*, No. 76-709, argued November 7, 1977; *McAdams* v. *McSurely*, No. 76-1621, argued March 1, 1978. Indeed, respondents in *Economou* made an argument almost identical to the argument of respondents here.

Respondents also err in contending (Br. in Opp. 15-16) that the immunity question cannot be decided in advance of a factual determination whether the district court or the Department of Justice made an investigation of petitioner's conduct. The position we take here does not turn on that question; we merely argued (Pet. 17) that the court of appeals erred in basing its decision denying immunity on its assumption that no official inquiry had been made. We also stated that "*if* the issue were relevant" (Pet. 18; emphasis supplied)—which in our view it is not—the court's assumption that there was no investigation is contrary to fact.

2. Respondents' contention (Br. in Opp. 16-18) that the question presented for review by the petition (Pet. 2) does not fairly state the issue presented by this case is incorrect. The court of appeals held that petitioner's alleged misconduct was not entitled to absolute immunity because it occurred in connection with the grand jury's "investigative" rather than its "deliberative" role (Pet. App. 27a). In view of the facts alleged in the complaint, that amounts to a holding that absolute immunity provides no meaningful coverage of the ordinary functions and actions of a prosecutor in conducting a grand jury proceeding. That is so because, in this case, the district court's question and petitioner's answer directly concerned and related to the witnesses then being presented by petitioner to a grand jury, and because the same grand jury issued indictments later that day.

The court of appeals' view necessarily is that the "deliberative" functions of a grand jury (during which a prosecutor would, under the court's theory, be entitled to immunity) are limited to the final stages of the grand jury proceedings from which, under Fed. R. Crim. P. 6(a), the prosecutor is excluded. In short, the question presented reflects the breadth of the court of appeals' holding.

For the foregoing reasons, in addition to the reasons set forth in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General,

JUNE 1978.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 286885 39